

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RUSSELL GALE,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 243283

Cheboygan Circuit Court

LC No. 01-002409-FC

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction¹ of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under thirteen years old). Defendant was sentenced to 8 to 20 years' imprisonment. We affirm.

Defendant first contends that the prosecutor committed misconduct in a variety of ways during the course of the trial and that the trial court erred by denying his motion for a mistrial which was based upon prosecutorial misconduct. This Court reviews claims of prosecutorial misconduct de novo by reviewing the allegations in context "to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), citing *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), and *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court reviews decisions regarding a motion for a mistrial for an abuse of discretion. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

Defendant first contends that the prosecutor vouched for the credibility of the victim. "A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). In determining whether the prosecutor was vouching for the credibility of a witness, the challenged remarks must be considered in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

¹ Defendant was tried twice for this offense, with the first trial ending in a mistrial.

Defendant cites a series of the prosecutor's remarks in closing and rebuttal argument, but he does not consider them in context. Considered in context, the prosecutor's remarks did not constitute impermissible vouching for the victim. Rather, the prosecutor permissibly argued that the jury should believe the victim because the evidence and testimony corroborated the victim's claims. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).

Defendant next contends that the prosecutor attempted to improperly impeach defendant with a forty-year-old misdemeanor plea conviction. However, before the prosecutor could complete the question, and before defendant answered, defense counsel objected and the trial court sustained the objection. The trial court subsequently instructed the jury to disregard the prosecutor's last question.

Defendant next claims that the prosecutor also committed misconduct in attempting to impeach defendant's character by questioning him regarding the absence of a relationship with his daughter. Any minimal prejudice caused by the prosecutor's brief questioning could have been eliminated by a timely curative instruction. *Ackerman, supra* at 449. In the absence of an instruction, the trial court's statement that these inquiries were "too far afield," combined with the sustaining of defendant's objection and the trial court's subsequent general admonition that the questions of counsel were not evidence, were sufficient to protect defendant's right to a fair trial. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also contends that, contrary to the trial court's pretrial ruling, the prosecutor improperly brought out that the incidents of sexual touching had been occurring every time defendant came to visit the victim's family. Defendant argues that this testimony violated the trial court's pretrial ruling that the victim's mother would only be permitted to testify concerning the victim's statements to her about defendant's behavior on his last visit. The trial court was in the best position to determine whether its order was violated and we conclude that defendant has failed to demonstrate that the trial court abused its discretion by deciding that the order had not been violated.

Defendant next claims that the prosecutor improperly bolstered the victim's testimony by the use of prior consistent statements. However, defendant fails to direct this Court to what particular prior consistent statement was admitted. Failure to identify the language to which an objection is made or to direct the Court to the location of the offending language in the record prevents this Court from reviewing the claim. *People v Nathaniel Johnson*, 113 Mich App 414, 421; 317 NW2d 645 (1982).

We also reject defendant's argument that the prosecutor exceeded the limits of an agreement regarding the questioning of an expert witness. Because defendant failed to obtain a transcript of the court's ruling with respect to the agreement, and because there was no objection on the record by defendant during the expert's testimony, defendant failed to preserve any claim regarding the scope of the expert's testimony. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999).

Defendant finally claims that even if these instances of alleged prosecutorial misconduct are insufficient, individually, to require reversal, their cumulative effect caused sufficient prejudice to mandate a new trial. Because we have not found error with respect to any of defendant's individual allegations, a finding of cumulative error is unwarranted. *People v*

Wilson, 196 Mich App 604, 610; 493 NW2d 471 (1992).

Defendant next contends that the trial court abused its discretion by granting the prosecutor's motion to amend the information to expand the time frame of the charged offense to the period from January to May 1998. There was substantial testimony that multiple penetrations occurred each time defendant visited over a lengthy period of time. The trial court denied the prosecutor's motion to amend the time period to cover the entire time frame from 1995 to 1998, but did grant an amendment for a limited five-month period.

The trial court is given broad discretion to grant amendments to the information to correct any defects or to conform it to the proofs at trial. MCL 767.76; MCR 6.112(H); *People v George*, 375 Mich 262, 264; 134 NW2d 222 (1965); *People v Kurzinski*, 26 Mich App 671, 674; 182 NW2d 779 (1970). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the court acted, would say there was no justification or excuse for the ruling made." *People v Jenkins*, 244 Mich App 1, 21; 624 NW2d 457 (2000), citing *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court did not abuse its discretion by granting the prosecutor's motion to amend the information. The prosecutor sought to amend the information to provide that the charged CSC I occurred sometime between 1995 and 1998. The trial court restricted the time of the charged offense to sometime from January 1998 to May 1998. That decision restricting the time frame to a five-month period instead of the four-year period sought by the prosecutor shows that the trial court exercised its discretion. Furthermore, the amendment was consistent with the evidence presented at trial.

"A defendant is not prejudiced by an amendment to the information to cure a defect in the offense charged when the original information was sufficient to inform the defendant and the court of the nature of the charge." *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980). The charge itself was never changed from one count of first-degree CSC. Furthermore, time is not of the essence in child criminal sexual conduct cases. *People v Stricklin*, 162 Mich App 623, 633-635; 413 NW2d 457 (1987). Thus, the disputed amendment did not cause defendant any unfair prejudice, and defendant cannot legitimately argue that he lacked notice that the victim would claim she was abused on numerous dates over a period of time.

Moreover, defendant did not request a continuance to prepare to defend against this amendment, and his own testimony established that there was a time period during the last day of his visit that he was essentially alone with the victim. Coupled with the victim's testimony that defendant touched her almost daily whenever he visited and that she did not recall with specificity whether defendant touched her on the last day of his visit, the amendment of the information did not constitute an abuse of the trial court's discretion.

Regarding defendant's claim that the trial court abused its discretion by permitting the prosecutor's expert witness to testify that it was not uncommon for victims (or their families) to refrain from reporting child sexual assaults, this testimony was properly admitted. Additionally, defendant did not obtain a written order limiting the expert's testimony, his counsel appears to have waived any objection to the "expanded" testimony, and no objection was made during the expert's testimony. Therefore, we review this issue only for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 763; 597 NW2d 130 (1999). The

victim and her mother explained why they did not immediately report defendant's sexual assaults. Thus, the expert's testimony was merely cumulative. Defendant has therefore failed to demonstrate plain error that affected his substantial rights.

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio